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No. 89-369

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1989

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GENERAL MOTORS CORPORATION,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

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## BRIEF FOR THE DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF LOUISIANA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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## QUESTIONS PRESENTED

1. Whether the Clean Air Act, which requires the Environmental Protection Agency ("EPA") to approve or disapprove a State Implementation Plan ("SIP") within four months of a state's submission of the SIP to EPA, imposes a similar deadline on EPA's consideration of a state's proposed revision of that SIP.

2. Whether EPA, having failed either to approve or disapprove a state's revision to its SIP within four months, may bring an enforcement action on the original SIP before approving or disapproving the revision or may collect penalties relating to the period of its delay.

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### INTEREST OF THE AMICUS [1]

The State of Louisiana, like all other states, has a major role in the regulation of air pollution under the Clean Air Act ("Act"), 42 U.S.C. §§ 7401 *et seq.* (1982). Under the Act, each state has primary responsibility for devising, administering, and, if necessary, revising a State Implementation Plan ("SIP") to achieve the National Ambient Air Quality Standards that the Environmental Protection Agency ("EPA") has established. In Louisiana,

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[1] Counsel for both parties have consented to the filing of this brief. Their consents have been filed with the Clerk of this Court.

that responsibility rests with the Department of Environmental Quality ("DEQ"). Both original SIPs and SIP revisions are subject to EPA approval. This case raises important questions concerning the respective roles of the federal government and the states in the adoption of SIPs: namely, whether EPA must review SIP revisions within the four-month period specified in the Act for review of original SIPs, and what consequences flow from EPA's failure to meet that deadline. The State of Louisiana, through DEQ, has a significant and immediate interest in the resolution of these issues.

## STATEMENT

1. The Clean Air Act is a comprehensive statute governing the control of air pollution. Congress amended the Act in 1970, and again in 1977, to create an important partnership between the federal government and the individual states in setting and achieving National Ambient Air Quality Standards throughout the country. The division of authority under the Act is well-defined: the federal government, through EPA, promulgates National Ambient Air Quality Standards on a pollutant-by-pollutant basis; in turn, the states—through agencies such as DEQ—adopt State Implementation Plans ("SIPs") to ensure achievement of those standards within their jurisdictions. *See* 42 U.S.C. §§ 7409, 7410.

The Act expressly gives each state "primary responsibility" for ensuring air quality within its borders. 42 U.S.C. § 7407(a). The Act empowers each state to determine what combination of regulatory requirements will best ensure the attainment of National Ambient Air Quality Standards within its jurisdiction and to design its SIP in a manner that is consistent with the state's political, economic, and social policy concerns. *See, e.g., Union Electric Co. v. EPA*, 427 U.S. 246, 266-67 (1976). Although the state must submit its SIP to EPA for review and approval (42 U.S.C. § 7410(a)(1), (2)), the



Act prohibits EPA from rejecting any SIP that satisfies the Act's substantive and procedural requirements. 42 U.S.C. § 7410(a)(2); *see Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975) (noting that EPA "is *required* to approve a state plan" that will result in the attainment of the National Ambient Air Quality Standards and that meets the other statutory requirements for evaluation of a proposed SIP) (emphasis in original). The Act, moreover, requires EPA either to approve or disapprove a SIP within four months of its submission. 42 U.S.C. § 7410(a)(2). Once EPA approves the SIP, both the state and the federal government have authority to enforce it. The state's enforcement authority derives from its adoption of the SIP through the state's regulatory and legislative process; EPA's authority derives from the Act itself. *See* 42 U.S.C. § 7413.

In enacting the Act, Congress recognized that each state requires the freedom to revise its SIP from time to time to reflect new technology, changes in local needs, or other developments. Consequently, the Act permits a state to revise its SIP at any time it deems appropriate. *See* 42 U.S.C. § 7410(a)(3)(A). As with the original SIP, the Act requires the state to submit any SIP revision to EPA for approval; EPA, however, may not reject a SIP revision if it will result in the attainment of the applicable National Ambient Air Quality Standards and if it meets the other requirements applicable to the evaluation of original SIPs. 42 U.S.C. § 7410(a)(3)(A); *see id.* § 7410(a)(2).

2. General Motors owns and operates an automobile assembly plant in Framingham, Massachusetts that, as a product of its painting operations, emits volatile organic compounds ("VOCs"). In February 1979, EPA promulgated the National Ambient Air Quality Standards for ozone. 44 Fed. Reg. 8220 (1979). Later that year, Massachusetts adopted a proposed SIP limiting VOC emissions from sources in the Framingham, Massachusetts

area (310 CMR § 7.18(7) (1979)), including the painting operations at General Motors' plant. The SIP, which EPA approved in 1980 (45 Fed. Reg. 61,293, 61,295 (1980)), required compliance by December 31, 1985—two years before the Act's December 31, 1987 final compliance deadline for attainment of the national ozone standards. *See* 42 U.S.C. § 7502(a)(2).

On October 20, 1981, EPA published a policy statement advocating deferral of the ozone compliance dates for automobile painting operations. 46 Fed. Reg. 51,386-88 (1981). The policy statement noted that the automobile industry was developing new technology to reduce VOC emissions. Accordingly, EPA concluded that allowing a deferral of compliance would give the industry needed time to develop a more efficient and cost-effective technology. To this end, the policy statement provided that EPA would approve state-submitted revisions of SIPs giving auto makers until 1986 or 1987 to achieve final compliance with the emission limits for painting operations in order to allow for further development of coating technology—provided that the extension did not impact the states' ability to obtain the ambient air quality standards.

In 1984, pursuant to this policy statement, General Motors submitted to Massachusetts a timely request for an extension of the compliance deadline for its Framingham painting operations until December 31, 1987. General Motors based this request on its proposed installation of abatement controls at its then-existing painting facility. Subsequently, General Motors decided to close its existing painting facility and replace it with a new technologically-advanced system designed to achieve substantially lower VOC emissions. On June 7, 1985, General Motors informed Massachusetts of its revised plans and reiterated its request for an extension of the SIP compliance deadline to December 31, 1987. Following a public hearing, which an EPA representative attended, Massachusetts revised its SIP to extend the applicable



compliance deadline to August 31, 1987, a twenty-month extension of the initial state deadline but still several months short of the Act's attainment deadline for ozone. Massachusetts submitted the SIP revision to EPA for approval on December 30, 1985. Pet. App. 6a; Supp. Pet. App. SA-3.

For 33 months, EPA took no final action to approve or disapprove Massachusetts' SIP revision; the compliance deadlines for both the original SIP and SIP revision passed without final EPA action.[2] In the interim, General Motors proceeded with its state-approved compliance strategy. It closed the old Framingham painting facility on schedule and spent over $200 million on the construction of a new facility, using a more effective and environmentally sound painting system. Finally, on September 16, 1988, EPA disapproved the proposed SIP revision. Pet. App. 8a.

3. On August 14, 1986, prior to taking final action on the proposed SIP revision, EPA issued a Notice of Violation to General Motors, asserting that the Framingham painting facility was in violation of Massachusetts' *original* SIP. Supp. Pet. App. SA-4. Thereafter, on August 17, 1987, nearly 20 months after Massachusetts submitted its proposed SIP revision to EPA but still prior to any final action on that revision, EPA filed its complaint in federal district court in Massachusetts. EPA sought civil penalties for the violation of the 1985 deadline in the original SIP.[3]

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[2] On December 2, 1986, EPA issued a Notice of Proposed Rulemaking, stating that it was considering disapproval of the revision. 51 Fed. Reg. 43,394 (1986). It reasoned that "[e]xtensions of the December 31, 1985 date should instead be obtained through an enforcement mechanism," *id.* at 43,395, ignoring the fact that the entire purpose of the revision was to change the 1985 compliance deadline and thereby preclude its enforcement. General Motors and Massachusetts both filed comments in opposition to the proposed disapproval.

[3] In addition, EPA sought injunctive relief even though General Motors had permanently closed the old Framingham paint shop over a month earlier. EPA later withdrew its request for such relief.

4. On May 16, 1988, the district court granted summary judgment to General Motors. The court held that the Act required EPA to act upon Massachusetts' proposed SIP revision within four months and that EPA, having failed to do so, was precluded from enforcing the old SIP until it made a decision on the SIP revision.

The district court found that the application of the four-month limitation to EPA's review of SIP revisions derived support from the "structure" of the statute, which provides for "a cooperative venture in which federal authorities prescribe long-term national standards but allow each state, within limits, to determine the best way to reach them." Supp. Pet. App. SA-4-5. It further found that the application of a four-month SIP review period was appropriate on policy grounds as well. First, the court noted that "EPA always holds the ultimate trump card" because "it may at an[y] time during or after the allowed four-month period reject the proposal and invoke enforcement proceedings under the original SIP." *Id.* at SA-6. Second, the court found that "it strains credulity that truly important or controversial SIP revisions cannot be effectively identified early on in the process and scheduled for expedited review." *Id.* Finally, the court noted that a period longer than four months "would leave both the states and the affected industries in an unjustifiable state of limbo." *Id.* The states "would be unable to act to balance dictated national priorities with the interests of its citizens and industries," and the industries would face the dilemma of "ceasing operations now, or possibly being forced out of business by heavy fines later." *Id.*

The court also addressed the ramifications of EPA's failure to meet the four-month deadline. It held that where, as here, EPA does not render a decision on a proposed SIP revision within four months, it is "prohibited from bringing or continuing enforcement proceedings under the original SIP until final action is taken." Supp. Pet. App. SA-7.



5. EPA appealed the district court's order.[4] On June 7, 1989, the First Circuit reversed the district court and remanded the case for further proceedings. It agreed with the district court that the Act requires EPA to review SIP revisions within four months. Pet. App. 9a-12a. It held, however, that EPA may still bring an enforcement action and collect penalties notwithstanding its failure to act on a proposed revision within that four-month period. The court acknowledged that "Congress clearly was concerned with preserving the states' ability to tailor SIPs to local needs and conditions," *id.* at 11a, and that Congress did not intend "the states' legitimate policy choices to be held hostage to the EPA's schedule." *Id.* at 12a. The court nonetheless held that the district court should not have dismissed EPA's enforcement action. *Id.* at 12a-18a. Rather, the court concluded that, when EPA fails to comply with the four-month period, a "twofold" remedy is available: (1) the affected company may file suit under Section 304(a)(2) of the Act to compel EPA to act, 42 U.S.C. § 7604(a)(2), or (2) at the penalty stage of an enforcement suit, the district court may take into account EPA's delay, and the prejudice that the company suffered as a result, in assessing penalties. Pet. App. 14a-15a. The court noted that the district court's "power to adjust the penalties" will give EPA "the necessary incentive to act without unreasonable delay." *Id.* at 15a-16a.

## SUMMARY OF ARGUMENT

I. Under the Clean Air Act, EPA has only four months to approve or disapprove a state's revision of its SIP. This conclusion follows from both the language and structure of the Act. Section 110(a)(2), which governs original SIPs, explicitly provides for a four-month re-

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[4] EPA filed its opening brief on September 16, 1988, the same day that it published its decision disapproving Massachusetts' proposed SIP revision.

view period. 42 U.S.C. § 7410(a)(2). Section 110(a)(3)(A), which governs SIP revisions, specifically incorporates "the requirements" of Section 110(a)(2). 42 U.S.C. § 7410(a)(3)(A). Not surprisingly, every court of appeals to address the issue has concluded that EPA must act on SIP revisions within four months. These courts, like the court below, have so held because a contrary ruling would be inconsistent with the statutory scheme and would have grave policy implications. Absent a four-month rule, EPA would have no incentive to render a timely decision regarding SIP revisions. Contrary to Congress' intent to give states a primary role in the attainment of air quality within their borders, EPA could essentially exercise a "pocket veto" over a state's proposal simply by refusing to take action on the SIP revision.

II. Having correctly concluded that the Act requires EPA to act on a SIP revision within four months, the court below effectively nullified that limitation by holding that EPA can still take enforcement action based on the original SIP, and can still collect noncompliance penalties, even though it fails to adhere to that statutory period. The court below thus refused to adopt a rule imposing a temporary enforcement ban that would preclude EPA from enforcing the original SIP during the pendency of EPA's delay in acting on a SIP revision. It declined to do so even though such a rule properly accommodates the federal-state partnership that Congress created in the Act and effectively advances the Act's purposes of achieving air quality.

There is no merit in any of the reasons advanced against such a temporary enforcement ban. A temporary ban would not, as the United States has suggested, encourage states and industry to submit last-minute SIP revisions to thwart EPA's enforcement authority. Moreover, a less severe remedy would be inadequate to effectuate the Act's purposes. Contrary to the reasoning of the court below, industries do not have effective alternative means of addressing agency delay in the review of SIP revisions that the states deem necessary to achieving air quality within their boundaries. Finally, a temporary enforcement ban is a reasonable consequence of EPA's failure to meet that four-month deadline. Congress explicitly selected that deadline, and EPA is not free to ignore it with impunity.



## ARGUMENT

### I. THE CLEAN AIR ACT REQUIRES EPA TO ACT ON SIP REVISIONS WITHIN FOUR MONTHS

In defending the First Circuit's judgment, the United States makes the threshold argument that the four-month time period applicable to original SIPs is not applicable to SIP revisions. U.S. Opp. Cert. 8-9. Recognizing that it did not prevail on this point below, the United States advances this argument "as an alternative ground for upholding the court of appeals' judgment." U.S. Opp. Cert. 8 n.1. Both courts below, however, properly rejected this argument. An analysis of the Act's language, structure, and underlying policies amply demonstrates that Congress intended the four-month period to apply to both original SIPs and SIP revisions.

In interpreting a statute, this Court's analysis must "begin, as always, with the language of the statute itself." *Public Employees Retirement System v. Betts*, 109 S. Ct. 2854, 2865 (1989). Section 110(a)(2) of the Act requires EPA to approve, within four months, any SIP that provides for the attainment of the appropriate National Ambient Air Quality Standards and that fulfills certain technical requirements. 42 U.S.C. § 7410(a)(2). Anticipating that the states would have to revise these SIPs periodically, Congress further provided, in Section 110(a)(3)(A) of the Act, that the Administrator of EPA "shall approve any revision of an implementation plan applicable to an air quality control region *if he determines that it meets the requirements of* [*§ 110(a)(2)*] and has been adopted by the State after

reasonable notice and public hearings." 42 U.S.C. § 7410 (a)(3)(A) (emphasis added).[5]

Although Section 110(a)(3)(A), unlike Section 110 (a)(2), does not contain an express deadline for EPA's approval or disapproval of a proposed SIP revision, its incorporation of both the substantive and procedural requirements of Section 110(a)(2) reflects that Congress intended the four-month limitation to apply to SIP revisions as well. Not surprisingly, in addition to the court below, the four other courts of appeals that have faced the question have agreed that the four-month limitation applies to SIP revisions. *See Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983); *Council of Commuter Organizations v. Gorsuch*, 683 F.2d 648, 651-52 n.2 (2d Cir. 1982); *Council of Commuter Organizations v. Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *American Cyanamid Co. v. EPA*, 810 F.2d 493, 495 (5th Cir. 1987); *General Motors Corp. v. EPA*, 871 F.2d 495, 498 (5th Cir. 1989); *United States v. Alcan Foil Products*, No. 88-6300, slip op. at 8 (6th Cir. Nov. 21, 1989).[6]

[5] The court below correctly held that EPA is not entitled to deference in its interpretation of these statutory provisions. *See* Pet. App. 11a; *accord United States v. Alcan Foil Products*, No. 88-6300, slip op. at 8 (6th Cir. Nov. 21, 1989). This Court has made clear that where, as here, the agency's interpretation of a statute involves a pure question of law, rather than the application of law to facts, it will not accord the agency's interpretation any particular deference. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *cf. Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468, 473 (1988) (refusing to give deference to agency litigation positions that are "wholly unsupported by regulations, rulings or administrative practice").

[6] In its brief in the court below, the United States placed great weight on dicta in a Sixth Circuit opinion, *United States v. National Steel Corp.*, 767 F.2d 1176, 1182-83 n.1 (6th Cir. 1985), in which the court suggested that the four-month limitation does not apply to SIP revisions. The Sixth Circuit, however, recently disavowed that dicta and held—consistent with all other circuits that have faced this issue—that EPA must act on SIP revisions within four months. *See United States v. Alcan Foil Products*, slip op. at 8.



This interpretation fully comports with the structure of the Act. In the Act, Congress established a federal-state cooperative program that requires EPA to set National Ambient Air Quality Standards for particular pollutants. 42 U.S.C. § 7409. The Act, however, vests the states with "the primary responsibility for assuring air quality within the entire geographic area comprising such State." 42 U.S.C. § 7407(a). It gives them wide latitude to "specify the manner in which national primary and secondary ambient air quality standards will be achieved" within their borders. 42 U.S.C. § 7407(a); *see Train v. Natural Resources Defense Council, Inc.*, 421 U.S. at 79. It thus ensures, as the court below noted (Pet. App. 4a), that the states can adopt particular air regulations that address local needs, current technology, and other developments. *See, e.g., Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 789 (3d Cir. 1987); *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984).

Consistent with the states' primary role in developing plans to achieve air quality, Congress carefully limited EPA's corresponding role in this process. Of course, the Act does require EPA to review all SIPs. 42 U.S.C. §§ 7410(a)(2) & 7410(a)(3)(A). It makes equally clear, however, that EPA *must* approve a proposed SIP or SIP revision if it satisfies the objective requirements of Section 110(a)(2) of the Act. 42 U.S.C. §§ 7410(a)(2) & 7410(a)(3)(A); *see Train v. Natural Resources Defense Council, Inc.*, 421 U.S. at 79; *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d at 781. Because Congress did not assign EPA a broad policy-making role in the design of SIPs, it had no need to give EPA a lengthy time period for SIP review. A four-month limitation on EPA's review process is, therefore, entirely consistent with the limited and carefully-circumscribed role that EPA plays in the development and approval of SIPs.

A four-month deadline for approval of SIP revisions is likewise consistent with one of the Act's recurrent themes: the need for speedy achievement of National Ambient Air Quality Standards. Congress made abundantly clear its intent that the states, along with EPA, must put SIPs into place as quickly as possible and implement them with dispatch. Thus, Congress gave EPA only 120 days to promulgate National Ambient Air Quality Standards, 42 U.S.C. § 7409(a)(1); it gave states only nine months thereafter to submit their SIPs for approval, *id.* § 7410(a)(1); and it gave EPA only four months after such submissions to approve those plans, *id.* § 7410(a)(2). Moreover, it gave EPA only 90 days to approve or disapprove a state's order delaying the date by which a source must comply with its SIP. 42 U.S.C. § 7413(d)(2). To conclude, as the United States has argued, U.S. Opp. Cert. 9, that a four-month limitation on the approval of SIP revisions is "unwarranted" would plainly contravene Congress' intent to ensure prompt attainment of air quality through effective state plans. *See* S. Rep. No. 1196, 91st Cong., 2d Sess. 21 (1970), *reprinted in* 1 *A Legislative History of the Clean Air Act Amendments of 1970* ("*Legislative History*"), at 414 (1974) ("[i]n order to insure achievement of air quality necessary to protect the health of persons within the period specified in the bill, time constraints would be placed on the [Administrator's] review and approval authority").[7]

The court of appeals' determination that EPA must act on a SIP revision within four months properly effectuates congressional intent and the important policies underlying the Act. Absent a four-month limitation on EPA's review of SIP revisions, EPA would remain free to delay action on those revisions and thus to hold "the states' legitimate policy choices . . . hostage to the EPA's schedule." Pet. App. 12a. Even though a state has proposed a SIP revision that it deems appropriate to effectuate both the Act's purposes and the state's own local interests, EPA can—for any reason or for no reason at all—exercise a "pocket veto" over a state's determination of the proper means to control air emissions merely by delaying action on the SIP revision. This pocket veto expands EPA's review power far beyond its statutory authority by freeing EPA from the standards that Congress imposed under Section 110(a)(3)(A). *Cf. American Cyanamid Co. v. EPA*, 810 F.2d at 495 (noting that EPA "must" approve plans and revisions that satisfy the statutory requirements); *Duquesne Light Co. v. EPA*, 698 F.2d at 471 (noting that EPA is required to approve plans that are adopted after reasonable notice and hearing if they will attain and maintain National Ambient Air Quality Standards). *See also* Pet. App. 10a (discussing "Congress' decision to limit the EPA's discretion to reject a state plan" and holding that "the Act gives the Agency no more discretion to reject a SIP revision than to reject an original SIP"). Certainly, Congress did not intend to grant EPA such a pocket veto and to permit EPA to usurp the states' role as the principal architects of their air quality programs. *See Concerned Citizens of Bridesburg v. EPA*, 836 F.2d at 781.

The threat of lengthy delay, moreover, can only undermine the achievement of better air quality. States have the responsibility to develop new and innovative emission control strategies to reduce air pollutant emissions. To encourage industry to attempt such development, states must be able to revise their air plans to permit the new technology and assure industries that, within a relatively short period of time, EPA will make a final decision on whether the revised plan meets the

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[7] *See also* 116 Cong. Rec. 33,116-17 (Sept. 22, 1970), *reprinted in* 1 *Legislative History*, at 385 (1974) (statement of Sen. Cooper) ("[o]ne of the principal difficulties for the existing law has been the lack of a decisive enforcement authority and the bill before the Senate seeks to streamline and expedite this authority so that procedural delays in enforcement activities do not frustrate the clear intent of the . . . Act").

statutory standards. The absence of a four-month rule would, therefore, discourage industries from taking these innovative approaches, thereby increasing emissions. It would require them to factor the unnecessary uncertainty associated with EPA delay into important decisions about whether to install emission control equipment, what kind of control technology to adopt, and when to install that technology. For example, in the present case, Massachusetts granted General Motors a 20-month extension of the compliance deadline to allow General Motors to develop a new technology to reduce VOC emissions. Had General Motors waited for EPA to act on the proposed revision before investing in this new technology, Massachusetts' goal of reducing emissions would have been seriously undermined.

The absence of a four-month rule would also deprive the states of vital enforcement powers. Under the Act, the states are the primary enforcement authorities of clean air regulations. *See* 42 U.S.C. § 7413. When a state revises its SIP, its old SIP may no longer be a part of its regulations. Additionally, in the absence of EPA approval, the state may be reluctant to bring an enforcement action to compel a company to comply with its new SIP.

In short, the Act's language, structure, and underlying policies strongly support the application of the four-month rule to SIP revisions. For this reason, the Court should affirm this aspect of the decision below.

## II. WHEN EPA FAILS EITHER TO APPROVE OR DISAPPROVE A STATE'S SIP REVISION WITHIN FOUR MONTHS, IT IS BARRED FROM BRINGING AN ENFORCEMENT ACTION BEFORE ACTING ON THE PROPOSED REVISION AND MAY NOT COLLECT PENALTIES RELATING TO THE PERIOD OF ITS DELAY

Although the court below correctly held that EPA must act on proposed SIP revisions within four months, its conclusion that EPA's failure to do so does not preclude it from enforcing the original SIP during the period of delay renders the time limitation meaningless. The decision below replaces the strong incentive of an enforcement bar with remedies that provide EPA with far less motivation to act promptly on a state's proposed SIP revision. In so doing, the decision improperly ignores the states' "primary responsibility" for assuring air quality within their borders, *see* 42 U.S.C. § 7407(a), and, accordingly, their vital interests in adopting timely and responsive SIP revisions. Because this approach comports with neither the Act's structure nor its underlying policies, and because it undermines the critical role that the states play under the Act, this Court should not approve it. Rather, this Court should hold that EPA cannot enforce existing SIP provisions or collect penalties for noncompliance during the period of its delay, *i.e.*, from the expiration of the four-month review period until it acts on a proposed SIP revision.



### A. A Temporary Limitation On EPA's Authority To Enforce An Original SIP, When It Has Failed To Act On A Pending SIP Revision, Comports With Both The Act's Structure And Legislative Purpose

Neither the language of the Act nor its legislative history answers the second issue in this case: whether, and to what extent, EPA's failure to act on a SIP revision within four months deprives it of enforcement authority during the pendency of its delay. Although the Act's language is silent on this issue, its structure provides persuasive evidence that Congress did not intend to afford EPA unfettered authority to take enforcement actions that are at odds with the states' authority to develop and implement plans to achieve air quality.

This Court has recognized that EPA plays a cooperative, but secondary, "role in the process of determining and enforcing the specific, source-by-source emission limitations" necessary to achieve National Ambient Air Qual-

ity Standards. *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. at 79. Congress vested the states, not EPA, with the authority to develop plans that best address their local interests consistent with the national goal of achieving air quality. *Id*; *Union Electric Co. v. EPA*, 427 U.S. at 266. Congress also contemplated that the states, rather than EPA, would retain primary enforcement authority under their SIPs.[8] For these reasons, "the interest of the state itself is deeply involved in the required four month approval or disapproval of the proposed revision." *American Cyanamid Co. v. EPA*, 810 F.2d at 500.

When a state proposes a SIP revision, it does so because it has concluded that the interests of its residents demand the revision. Under these circumstances, imposing a temporary limitation on EPA's power to enforce a SIP that no longer meets a state's interests plainly comports with the cooperative federal-state relationship that Congress established in the Act. This "bright-line" rule, which the Fifth Circuit adopted in *American Cyanamid*, provides the clearly-defined and effective incentive necessary to ensure that EPA acts promptly to approve or disapprove a state's proposed revision to its SIP. Prompt action reduces uncertainty within state environmental agencies, and the industries that they regulate, as to the status of the states' air programs and minimizes the possibility that the states will be unable to

[8] *See* 116 Cong. Rec. 42,520 (Dec. 18, 1970), *reprinted in* 1 *Legislative History*, at 112 (statement of Rep. Staggers) ("[t]he States on the other hand will have primary responsibility for the enforcement of State plans and the emission limitations provided for in those plans with regard to existing stationary sources"); 116 Cong. Rec. 42,382 (Dec. 18, 1970), *reprinted in* 1 *Legislative History*, at 127 (statement of Sen. Muskie) ("[t]he Senate remains convinced that most effective enforcement of standards would take place on the State and local levels. It was here that the public could participate most actively and bring the most effective pressure to bear for clean air").



take enforcement actions to ensure compliance with their revised (and preferred) means of achieving air quality.

This limitation on EPA's enforcement authority, moreover, accommodates these important state interests without sacrificing the Act's goal of achieving air quality or unduly compromising EPA's enforcement powers. Precluding EPA from enforcing an original SIP between the expiration of the four-month period and the date that it either approves or disapproves the SIP revision—a period that rests completely within EPA's control—is neither extreme nor unreasonable. This enforcement limitation does not mean that the states can transform their revised plans into "applicable implementation plan[s]" without EPA approval. *See* 42 U.S.C. § 7410(d). Nor does this limitation in any way deprive EPA of its ability to enforce the original SIP if it ultimately concludes that the SIP revision does not satisfy the Act's requirements; once EPA reaches such a conclusion, it can freely enforce the provisions of the original SIP. 42 U.S.C. § 7413(a). Although EPA is unable to collect penalties for noncompliance during the period that it delayed a decision on the SIP revision, that result is merely the price of agency delay. More importantly, that price provides the incentive to avoid that delay in the future.[9]

[9] Contrary to the assertion of the United States, U.S. Opp. Cert. 13, an enforcement bar in the circumstances presented here is not inconsistent with *Brock v. Pierce County*, 476 U.S. 253 (1986). In *Pierce County*, this Court allowed the Secretary of Labor to recover misused Comprehensive Employment and Training Act ('CETA") funds notwithstanding the Secretary's failure to make a determination, within the statutorily-mandated time period, that the funds were misused. The party who had misused the funds sought a *permanent ban* of the Secretary's ability to recover the funds, which would have substantially undermined Congress' intent to prevent the misuse of CETA funds. The rule that is advanced here, by contrast, only prevents enforcement of an original SIP during the period in which EPA delays its decision on the SIP revision beyond four months. EPA's regulatory authority is thus left intact, while its

### B. Neither The United States Nor The Court Below Provides Any Persuasive Reasons For Not Imposing A Temporary Ban On EPA's Enforcement Authority

The United States and the court below make various arguments to support their position that even a temporary ban on EPA's enforcement authority during the period that EPA fails to act on a SIP revision is improper. These arguments are that such a ban (1) would invite state-industry collusion in the submission of last-minute SIP revisions to stave off EPA enforcement action; (2) is unnecessary because of the availability of other measures to address agency delay; and (3) puts EPA in the position of having to comply with a statutory deadline that it lacks resources to meet. Those arguments do not withstand scrutiny.

1. The United States maintains that a temporary enforcement ban will "encourage industries to propose last-minute SIP revision proposals for the purpose of staying EPA enforcement actions and postponing compliance with SIP provisions." U.S. Opp. Cert. 12. This argument is all but frivolous.[10]

To begin with, the states, not industry, propose SIP revisions. The United States' argument therefore presumes, with no evidence or support, that states will act in bad faith to propose revisions solely for the purpose of undermining EPA's enforcement authority. In other

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enforcement authority is limited only to the extent that it fails to act within the statutory approval period. In short, the approach urged by DEQ reinforces Congress' intent, whereas the position of the defendant in *Pierce County* would have undermined that intent.

[10] EPA also asserts that the enforcement ban will give "noncomplying sources in States that propose revisions . . . unfair advantage over those in other States . . . ." U.S. Opp. Cert. 12. EPA, however, has the option to prevent such "advantage" by acting within four months on the proposed revision. Thus, any advantage is solely the result of EPA's failure to follow the Act.



words, the United States argues that states will improperly approve SIP revisions—regardless of whether such revisions satisfy the states' own interests—in order to undermine enforcement of the Act. EPA cites nothing to show that the states have engaged, or likely would engage, in such behavior.

Moreover, EPA's reference to "last-minute SIP revisions" totally misperceives the states' role in developing such revisions. Under the Act, a state may not submit "eleventh-hour" SIP revisions to EPA at a company's behest. The state must first comply with the Act's mandate that it provide reasonable notice of the SIP and hold public hearings. 42 U.S.C. § 7410(a)(1); 40 C.F.R. § 51.102 (state must conduct one or more public hearings and must provide 30-day notice to, *inter alia*, the public "by prominent advertisement," the Administrator, and each local air pollution control agency that will be significantly impacted). States must also comply with their own statutes and regulatory procedures governing legislation and rulemaking. The process of proposing SIP revisions is thus potentially lengthy and complicated—and is wholly incompatible with hastily-concocted and improperly-motivated SIP revisions. In addition, the mere submission of a proposed SIP revision will not automatically "stay" EPA enforcement actions. Such actions will be stayed or precluded only when, and only to the extent that, EPA fails to approve or disapprove the SIP revision within four months of its submission to EPA.

2. The court below and the United States further contend that companies held hostage to unreasonable agency delay have effective remedies short of a temporary protection from an EPA enforcement action. Pet. App. 14a; U.S. Opp. Cert. 10. They suggest that companies have two remedies: (1) a "company may at any time after the end of the four-month period bring suit in the district court under § 304(a)(2) of the Act to compel agency action," Pet. App. 14a; and (2) if the Section

304 remedy proves unavailing, the district court can "consider the reasonableness of the Agency's delay and the prejudice, if any, suffered by the company" at the penalty stage of a Section 113 proceeding, Pet. App. 15a; U.S. Opp. Cert. 10.[11] This "twofold" remedy, however, is both unworkable and inconsistent with the Act's policies.

As the court below indicated, Pet. App. 14a, companies undoubtedly can file actions to compel agency action under Section 304 of the Act. 42 U.S.C. § 7604. A court, moreover, can plainly "assess the Agency's reasons for not complying with the four-month time limit and take such action as it deems reasonable" in the context of a Section 304 action. Pet. App. 14a. But attempting to prevent agency delay with a suit to compel agency action under Section 304, at bottom, requires companies to divert valuable resources to fund entirely preventable and thus needless litigation. A final judicial determination that EPA has unduly delayed action, perhaps years after the submission of a SIP revision, would cost substantial time and money and would do little to enhance either EPA's efficiency or the states' interests in SIP adoption. Moreover, during the action, penalties could continue to accrue. It is hardly surprising, therefore, that the Sixth Circuit recently recognized that the remedy of a suit to compel EPA to act "is not very effective." *United States*

[11] In so concluding, the court eliminated a third potential remedy that the D.C. Circuit adopted in *Duquesne Light Co. v. EPA*, 698 F.2d 456. In that case, the court concluded that, in cases of agency delay, the penalty should be held in abeyance pending the agency's final decision on the proposed revision. If the revision is ultimately rejected, penalties may be assessed retroactively, with interest, for the entire period after the deadline. *Id.* at 472. The court below correctly determined that the D.C. Circuit's approach is "extreme"; it "gives the Agency little or no incentive to conclude its review within the statutory time limit because, no matter how long the Agency procrastinates, it knows that it may collect full penalties if the revision is ultimately rejected." Pet. App. 12a-13a.



*v. Alcan Foil Products*, slip op. at 14; *see also Duquesne Light Co. v. EPA*, 698 F.2d at 472 (section 304(a) does not "act as a full safeguard").

Seeking redress for agency delay pursuant to a Section 113 penalty proceeding is a similarly inadequate remedy. 42 U.S.C. § 7413. Of course, as the court below noted, the Act expressly permits a court, at the penalty stage, to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation," Pet. App. 15a; the "other factors," according to the court, include the reasonableness of the agency's delay. *Id.* The fact that agency delay would be a "factor" at a penalty proceeding, however, where the focus of the proceeding would be on industry rather than agency noncompliance, provides little assurance that courts will consider such delay more than superficially, if at all.[12] Thus, this redress provides little comfort to a company trying to determine whether it can follow a proposed SIP revision in the face of EPA inaction. More fundamentally, the equitable approach, which focuses on the harm suffered by industry as a result of EPA's delay, does nothing to address the harm suffered by the state in being unable to carry out its public policy. In short, such recourse does little to address the states' interests in gaining prompt review of SIP revisions.

Moreover, the "twofold" remedy that the court below advances will needlessly result in costly litigation for all involved parties. Because this approach allows an enforcement action prior to final EPA action with respect to a proposed SIP revision, it could allow EPA to pursue an enforcement proceeding before an administrative law

[12] Indeed, even after the decision below, judges have struggled with the parameters of these various factors and their usefulness in addressing agency delay in acting on SIP revisions. *Compare United States v. Alcan Foil Products*, slip op. at 14-15 (majority opinion), *with id.* at 17-19 (concurring opinion).

judge, the Administrator, and a federal court without determining whether the defendant was acting in conformity with a revised state plan that ensures the achievement of National Ambient Air Quality Standards. If, after all of these proceedings, EPA were to approve the state's revisions, the enforcement actions would have wasted the resources of the state, the federal government, and the defendant company. In addition, if penalties were collected and the proposal later approved, the defendant would have been penalized for following a course of conduct that EPA ultimately determined would result in the attainment of all relevant National Ambient Air Quality Standards.

Also, during the enforcement proceeding, instead of focusing on the importance of acting on SIP revisions within four months, EPA will spend countless hours and resources defending the reasonableness of its delay. Similarly, instead of focusing on the achievement of air quality through new technologies and cooperative state-industry ventures, industry will spend valuable time and money attempting to prove unreasonable agency delay and, thereby, reduce any penalties assessed against it under Section 113. Finally, the courts will devote enormous resources in adjudicating these disputes and developing appropriate standards to guide review of agency delay in these contexts. Adopting a "bright-line" rule that imposes a temporary ban on EPA's enforcement authority prevents this needless waste of agency, judicial, and industry resources.

3. Finally, the United States argues, U.S. Opp. Cert. 9, that a temporary enforcement ban is improper because EPA cannot comply with the statutory four-month review period given its large SIP revision workload. That argument completely misperceives the nature of EPA's statutory mandate.

The Act plainly contemplates that the primary burden of developing SIPs, including priority reviews, drafting



of plans, and public comment and hearings, rests with the states. The states, therefore, must invest substantial resources and time commitments to this task even before EPA becomes involved. By contrast, EPA's task is more limited. Congress expressly articulated the criteria that EPA must consider in reviewing SIPs and, significantly, deemed four months to be adequate time for EPA to do so. *See* 1 W. Rodgers, *Environmental Law: Air and Water* § 3.9, at 257 (1986) (noting that the principal reason for restricting procedural rights before EPA "is that ostensibly action must be taken quickly under the statutory scheme: The Administrator has only four months to approve or disapprove a submitted plan"). That EPA has the capacity to act more promptly is evidenced by its recent promulgation of procedures that are intended to enable it to do precisely that. *See* 54 Fed. Reg. 2214 (1989) (identifying "fundamental problems" with its approval process and adopting changes to make review faster and more efficient); U.S. Opp. Cert. 15-16 n.7 (noting that regulatory changes "should result in more expeditious decisions on SIP revision proposals").

In any event, EPA's limited resources do not justify its disregard of a statutory mandate to review SIP revisions within four months. To be sure, like each partner state, EPA confronts daily the task of allocating limited resources to various agency priorities. But, in Section 110 (a), Congress set a priority that EPA is not free to ignore: EPA must approve or disapprove SIPs and SIP revisions within four months. To the extent that EPA disagrees with that priority, for whatever reason, it must direct that concern to Congress.[13] EPA cannot simply ig-

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[13] Indeed, as the United States itself notes, U.S. Opp. Cert. 14 n.5, Congress is currently considering three bills that would amend the Act to require EPA, as a general matter, to act on a SIP revision within twelve months. *See* H.R. 99, 101st Cong., 1st Sess. § 103 (1989); H.R. 3030, 101st Cong., 1st Sess. § 101(a)(1) (adding

nore Congress' four-month limitation and force the states and the industries that they regulate to live with the day-to-day consequences of its delay.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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§ 110(e)(2) to the Act) (1989); S. 1490, 101st Cong., 1st Sess. § 101(a) (adding § 110(e)(2) to the Act) (1989). Another pending bill would allow EPA nine months to act on certain SIP provisions. H.R. 2323, 101st Cong., 1st Sess. § 401 (1989).